Supreme Court, U.S.
FILED
DEC 16 2002
OFFICE OF

No. 02-750

In The

Supreme Court of the United States

ROGERS MACHINERY COMPANY, INC.,

Petitioner,

v.

WASHINGTON COUNTY AND CITY OF TIGARD,

Respondents.

On Petition For A Writ Of Certiorari To The Oregon Court Of Appeals

RESPONDENTS' BRIEF IN OPPOSITION

DAN R. OLSEN
Counsel of Record
LORETTA S. SKURDAHL
WASHINGTON COUNTY COUNSEL
155 N. First Avenue, Suite 340
Hillsboro, Oregon 97124
(503) 846-8747
Attorneys for Respondent Washington County

TIMOTHY V. RAMIS
GARY FIRESTONE
RAMIS CREW CORRIGAN & BACHRACH LLP
1727 NW Hoyt Street
Portland, Oregon 97209
(503) 222-4402
Attorneys for Respondent City of Tigard

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Is a tax or legislatively set fee subject to the rough proportionality standard announced in *Dolan v. City of Tigard*, 512 U.S. 374 (1994)?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
COUNTER-STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	3
REASONS FOR DENYING REVIEW	5
I. The Oregon Court of Appeals' Decision Was Correct and Consistent with this Court's Takings Cases	5
II. If the Court Accepts Review, the Court Cannot Reach the Issue that Petitioner Wants to Reach Because the Decision is Supportable on Other Grounds	8
A. The TIF is a Tax under Federal Law	10
B. The TIF is a Tax under State Law	11
C. The TIF Was Not Imposed as a Condition of Approval	12
D. The Tax Issue Would Prevent the Court from Reaching the Issue that Petitioner Seeks to Have Heard	13
III. The Cases Do Not Present a Significant Conflict	13
IV. Cases Cited by Petitioner Can Readily Be Distinguished	15
V. The Issue Whether State Courts Are in Conflict Is Less Important When the Decision Is Not by the Highest Court in the State	17

TABLE OF CONTENTS – Continued

Page

VI. This Case Has Little Value as Precedent. The TIF Differs from Other Development Charges Because It Was Adopted as Tax by a Vote of the People 19

CONCLUSION 20

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

A. Magnano Co. v. Hamilton, 292 U.S. 40 (1934).....10

Benchmark Land Co. v. City of Battle Ground, 14 P.3d 172 (Wash. 2000), *aff'd*, 49 P.3d 8609 (Wash. 2002).....16

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999).....7, 18

City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369 (1974).....10

Clark v. City of Albany, 137 Or. App. 293, 904 P.2d 185 (1995), *review denied*, 322 Or. 644 (1996)..... 6

Commercial Builders of Northern California v. City of Sacramento, 941 F.2d 872 (9th Cir. 1991), *cert. denied*, 504 U.S. 931 (1992).....18

Dane v. Jackson, 256 U.S. 589 (1921)..... 8

Dolan v. City of Tigard, 512 U.S. 374 (1994).....*passim*

Ehrlich v. City of Culver City, 12 Cal.4th 854, 50 Cal. Rptr. 2d 242, 911 P.2d 429, *cert. denied*, 519 U.S. 929 (1996).....6, 7, 14

Henderson Bridge v. City of Henderson, 173 U.S. 592 (1899)..... 8

Home Builders Association of Central Arizona v. City of Scottsdale, 187 Ariz. 479, 930 P.2d 993, *cert. denied*, 521 U.S. 1120 (1997).....14, 18

Home Builders Association of Dayton v. City of Beavercreek, 729 N.E.2d 349 (Ohio 2000).....15

Houck v. Little River Drainage Dist., 239 U.S. 254 (1915).....8, 10

TABLE OF AUTHORITIES – Continued

Page

Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) 8

Krupp v. Breckenridge Sanitation District, 19 P.3d 687 (Colo. 2002) 14

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 6

Manocherian v. Lenox Hill Hospital, 643 N.E.2d 479 (NY 1994) 16

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) 5, 7, 16

Northern Illinois Homebuilders Ass'n v. County of Du Page, 649 N.E.2d 384 (Ill. 1995) 17

Oregon State Homebuilders v. City of Tigard, 43 Or. App. 791, 604 P.2d 886 (1979) 12

Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978) 8

Portland General Electric v. Bureau of Labor and Industries, 317 Or. 606 (1993) 11

San Remo Hotel v. City and County of San Francisco, 27 Cal.4th 643, 117 Cal. Rptr. 2d 269, 41 P.3d 87 (2002) 7, 14

Town of Flower Mound v. Stafford Estates Limited Partnership, 71 S.W.3d 18 (Tex. App. – Fort Worth 2002) 14

Trimen Development Co. v. King County, 877 P.2d 187 (Wash. 1994) 16

United States v. Sperry Corp., 493 U.S. 52 (1989) 9

Waters v. Montgomery County, 337 Md. 15, 650 A.2d 712 (1994) 14

TABLE OF AUTHORITIES – Continued

Page

STATUTES, RULES AND OTHER AUTHORITIES

Supreme Court Rule 10 ..... 17, 18
OR. CONST. Art. XI, Section 11b(2)(b) and (d) 12
Washington County, Or., Charter Section 20(a) 11
Washington County, Or. Code ("W.C.C.") § 3.17.020A 1
W.C.C. § 3.17.020B 1, 11
W.C.C. § 3.17.040A 1
W.C.C. § 3.17.060A 10, 13
W.C.C. § 3.17.090 ..... 2, 10
W.C.C. § 3.17.100 ..... 2, 10
W.C.C. § 3.17.140 11
Washington County, Or. Ordinance 379 § 2B 10

OPINIONS BELOW

In addition to the documents referenced in the petition, Washington County Ordinance 379, the ordinance adopting the Traffic Impact Fee, together with Appendix A to that ordinance, are reproduced as an Appendix to this brief.[1]

COUNTER-STATEMENT OF THE CASE

Washington County, Oregon, is a growing suburban and rural county lying west of Portland, Oregon; the City of Tigard lies entirely within the county. In 1986, and again in 1990, the County Board of Commissioners, in accordance with County Charter provisions for taxes, referred to the voters the "Traffic Impact Fee", or "TIF". Ordinance 379 and the 1990 ballot measure approved by the voters referred to TIF as a tax. The purpose of TIF is to "ensure that new development contributes to extra capacity transportation improvements needed to accommodate additional traffic generated by such development". The TIF "tax shall provide funds for extra capacity improvements to county and city arterials". Washington County, Or. Code ("W.C.C.") § 3.17.020A & B (1997) Pet. App. F at 47. The tax is imposed on all land development within Washington County, including cities, W.C.C. § 3.17.040A, Pet. App. F at 51, subject to limited exceptions.

[1] Petitioner included the codified TIF ordinance and Appendix A to that ordinance as Appendix F to its petition. The portion of the TIF ordinance at Pet. App. F at 72-77 is reproduced in its original format for greater clarity, in the Appendix to this brief, App. at 5-8.

TIF revenue must be placed in a dedicated fund, and spent only for capacity-increasing transportation projects. W.C.C. § 3.17.090, 3.17.100, Pet. App. F at 62-63.

In September 1996, the City of Tigard granted development approval to Rogers Machinery to build a new light industrial building of over 30,000 square feet. The following February, the City assessed the tax for the new building.

Rogers appealed the TIF assessment to the County hearings officer, contending that the "light industrial" land use category was incorrect, that TIF did not comply with state statutes, and that the assessment violated constitutional tests under *Dolan v. City of Tigard*, 512 U.S. 374 (1994). At the hearing, Rogers testified that it planned to hire no new employees, and therefore would generate no new trips.[2] The parties presented legal argument on the

---

[2] Petitioner asserts that "it is undisputed that its development will generate no new trips." This statement is incorrect. In fact, the County contested Rogers' argument on this point before the hearings officer below, because it was based solely on testimony as to intent, and therefore was not an objective basis for trip determination. The County hearings officer stated that TIF "can be imposed when the proposed use, such as in the instant case, will generate no new trips." Pet. App. A at 45. This statement was part of the opinion that analyzed and rejected Rogers' argument that its statement of intent should be substituted for mandatory provisions of the ordinance. It would be incorrect to view the phrase "no new trips" as an ordinary factual finding of the hearings officer, because it was not a fact to be determined in that hearing. The only factual issues in determining the amount of the tax are the type of use and facts relating to the basis for trip determination. In the case of Rogers Machinery's building, the basis for trip determination is total gross square feet of additional space, so the only relevant issue is the size of the building, not the number of employees.

state statutory issues, whether TIF was a tax or fee, and whether *Dolan* applied to TIF. The hearings officer upheld the TIF assessment, allocated by component land uses,[3] holding that it was a tax not subject to *Dolan*. Rogers filed a writ of review in Washington County Circuit Court. That court sustained the hearings officer's holding that TIF is a tax, and as such was not subject to *Dolan*. Rogers appealed to the Oregon Court of Appeals, and the parties renewed their statutory and constitutional arguments. The court upheld the TIF, but declined to decide whether it was a fee or a tax. The Court of Appeals held that *Dolan*'s heightened scrutiny did not apply to a fee or tax that was legislatively imposed and calculated, applied generally to all development, and was subject to no meaningful discretion in imposition or calculation. 181 Or. at 400. Rogers' petition for review to the Oregon Supreme Court was denied. Pet. App. B. Rogers then filed its petition for certiorari with this Court.

SUMMARY OF ARGUMENT

Washington County and the City of Tigard request that the Petition for Writ of Certiorari be denied. The

[3] The amount due is the product of the pre-set trip rate and charge per trip for the land use category, multiplied by the square footage of Rogers' new building. The city's original TIF assessment, based on the light industrial category, applied a single trip rate per thousand square feet to the entire building. When Rogers Machinery provided information that different portions of the building were to be put to different uses, the City recalculated the amount of the TIF according to the different uses, and the hearings officer set the amount of the TIF to be paid based on the recalculation.

decision of the Oregon Court of Appeals below is correct and consistent with the decisions of this court and is not inconsistent with the decision in *Dolan v. City of Tigard*, 512 U.S. 374 (1994). The Oregon Court of Appeals correctly held, consistent with other jurisdictions from around the country, that a purely monetary charge imposed through a broad, legislatively adopted framework should be analyzed differently than a requirement to dedicate an interest in real property.

Even if the court were to grant *certiorari*, it would not reach the issue that petitioner seeks to have reviewed. This case involves the Washington County Transportation Impact Fee (TIF), a validly adopted tax, and it is undisputed that taxes are not takings. *Dolan* does not apply to taxes, only to takings.

Although petitioners claim there is a conflict among the courts, there is no real conflict. In all Takings Clause cases involving a broad legislatively imposed fee or tax that did not leave significant discretion as to application or amount, the courts have upheld the fee. Although the rationale for the cases may be different, the results have been the same. There is no real conflict.

The opinion below was issued by the Oregon Court of Appeals, which is not the appellate court of last resort in this state. Therefore, to the extent that a conflict is claimed, the conflict is less worrisome because the conflict is not among appellate courts of last resort. The decision is not inconsistent with Supreme Court decisions.

This case would provide little precedent because the ordinance at issue was adopted as a tax measure, unlike most development charges or impact fees. Because the TIF differs in that important respect, a decision regarding the

TIF would have little value as precedent for non-tax development charges.

REASONS FOR DENYING REVIEW

I. The Oregon Court of Appeals' Decision Was Correct and Consistent with this Court's Takings Cases.

The Oregon Court of Appeals closely followed this Court's takings jurisprudence as applied to a purely monetary charge imposed through a broad, legislatively adopted framework. It reviewed this Court's holdings in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan*. In both cases, the government sought to acquire an interest in real property as a condition of granting development approval for a single parcel. The Oregon Court of Appeals concluded that the critical concern underlying *Nollan* and *Dolan* was the unfairness of singling out a property owner seeking development approval for imposition of unique, adjudicated conditions requiring real property dedications. In the court's view, those elements had made it possible for a local government to make improper use of its legitimate regulatory authority by leveraging a specific interest in property. It quoted this Court's explanation of why the facts of *Dolan* led it to depart from the more deferential approach to land use regulation:

> [traditional land use regulations] involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. Second, the conditions imposed were not

> simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city.
> 181 Or. App. at 387 (citing *Dolan*, 512 U.S. at 385).

The court performed a detailed review of the TIF ordinance. It found the charge to be mandatory on all development in the county, set by a detailed, pre-established legislative framework, and that no significant discretion was involved in its imposition or calculation. *Id.* at 395, 397. Based on this, the court concluded that the factual predicate for *Dolan* – an adjudicative decision applicable to one parcel and a requirement to dedicate real property – was not present in *Rogers*. *Id.* at 387. It reasoned that the *Dolan* departure from a traditional standard of review was not warranted. TIF imposed a requirement to pay money, not an obligation to convey an interest in real property. Further, the special protection afforded to physical occupation of real property would not apply to a requirement to pay money. *Id.* at 382 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)). The court distinguished its earlier holding in *Clark v. City of Albany*, 137 Or. App. 293, 904 P.2d 185 (1995), *review denied*, 322 Or. 644 (1996). In *Clark*, the Oregon Court of Appeals had applied the *Dolan* tests to a requirement to pay for road improvements where no dedication of real property was required. The condition required in that case, however, was "an ad hoc adjudicatory imposition of a monetary exaction, not a generally applicable and legislatively imposed development fee". 181 Or. App. at 395.

The court undertook a detailed review of two post-*Dolan* California Supreme Court cases, *Ehrlich v. City of*

Culver City, 12 Cal. 4th 854, 50 Cal. Rptr. 2d 242, 911 P.2d 429, *cert. denied,* 519 U.S. 929 (1996); and *San Remo Hotel v. City and County of San Francisco*, 27 Cal. 4th 643, 117 Cal. Rptr. 2d 269, 41 P.3d 87 (2002). Both *Ehrlich* and *San Remo* involved development impact fees challenged as violations of the Takings Clause. In *Ehrlich*, two very different fees were at issue. A generally applied requirement to provide or pay for art in public places was upheld, 50 Cal. Rptr. 2d at 263, and the California court held it was not the kind of development action subject to the *Nollan/Dolan* analysis. The recreation fee, though a purely monetary charge, was subject to heightened scrutiny because it was imposed "neither generally nor ministerially, but on an individual and nondiscretionary basis." *Id.* at 257. In *San Remo*, the California Supreme Court followed the basic distinction set out in *Ehrlich*, holding that a monetary exaction would not be subject to *Dolan* because it was legislatively adopted, applied to all property within its class, and was nondiscretionary in imposition and calculation. The Oregon Court of Appeals in *Rogers* expressly adopted the analysis of the California Supreme Court in *Ehrlich* and *San Remo*. 181 Or. App. at 397.

This Court has expressly cautioned that the application of *Dolan* is to be limited: "[W]e have not extended the rough proportionality test of *Dolan* beyond the special context of exactions – land-use decisions conditioning approval of development on the dedication of property to public use." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702 (1999). The Oregon Court of Appeals in Rogers correctly followed this direction and refused to extend the application of *Dolan* beyond that set out by this Court.

II. If the Court Accepts Review, the Court Cannot Reach the Issue that Petitioner Wants to Reach Because the Decision is Supportable on Other Grounds.

While the Oregon Court of Appeals correctly held that a generally applicable requirement to pay "imposed on a broad range of specific, legislatively determined subcategories of property through a scheme that leaves no meaningful discretion either in the imposition or in the calculation of the fee" is not subject to the *Dolan* standards, 181 Or. App. at 400, it erred by even considering the question. The Oregon Court of Appeals acknowledged that the Takings Clause does not apply to taxes. 181 Or. App. at 379. This holding is consistent with a long line of cases from this court that taxes are not takings. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (the taxing power is an "obvious example" of a governmental power that does not give rise to takings claims); *Dane v. Jackson*, 256 U.S. 589, 598-99 (1921); *Houck v. Little River Drainage Dist.*, 239 U.S. 254, 264 (1915); *Henderson Bridge v. City of Henderson*, 173 U.S. 592, 614-15 (1899); *see Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491 n.21 (1987) ("Not every individual gets a full dollar return in benefits for the taxes he or she pays; yet, no one suggests that an individual has a right to compensation for the difference between the taxes paid and the dollar value of the benefit received.")

The Oregon Court of Appeals attempted to sidestep the question of whether the TIF is a tax. The court stated that the TIF "has a hybrid quality," incorporating aspects of both a tax and a fee or special assessment. 181 Or. App. at 381. It reached no conclusion as to whether a "hybrid" would be considered a tax for purposes of the Takings

Clause. It simply argued that characterization of the TIF as a tax would not address petitioner's challenge.

The Court of Appeals was wrong. If the TIF is a tax, which it is, petitioner's challenge is fairly and fully met and the only possible conclusion is that *Dolan* does not and cannot apply. If the petitioner had challenged the income tax as a taking, the classification of the income tax as a tax would have met petitioner's challenge squarely and would have determined the outcome of the case. The rules are no different here just because the tax in this case is imposed at the time of building permit issuance. If the TIF is a tax, it is not a taking, and *Dolan* does not apply.

The Court of Appeals did not conclude that the TIF is not a tax. As discussed in more detail below, it is a tax and the TIF is not subject to *Dolan* because as a tax it is not a taking.[4]

---

[4] Even if the TIF were not a tax, it would have to be considered a fee. Fees are subject to the rules set forth in *United States v. Sperry Corp.*, 493 U.S. 52 (1989), not the rules set out in *Dolan*. Petitioner has not argued that the fee violates any of the principles set out in *Sperry*. Indeed, in that case the Court held that the *availability* of the government service is sufficient to justify a fee, 493 U.S. at 63-64, and here the availability of the City's expanded transportation system, which Rogers Machinery in fact uses to access its property, is sufficient to justify the TIF, regardless of the petitioner's plans as to whether to hire additional employees. TIF proceeds are used for capacity-increasing transportation improvements. These facilities are planned to provide sufficient capacity to handle traffic based on the ability of existing and foreseeable development to generate traffic. An additional 30,000 square foot building creates the opportunity for more employees and more production, and therefore more trips, even if there are no immediate plans to add employees. Basing the TIF on the square footage results in less governmental intrusion into business by making the imposition of the TIF a relatively rare event (only when floor space is increased or there

(Continued on following page)

A. The TIF is a Tax under Federal Law.

This Court has defined "tax" as "an enforced contribution for the payment of public expenses." *Houck v. Little River Drainage Dist.*, 239 U.S. at 265; *accord, A. Magnano Co. v. Hamilton*, 292 U.S. 40 (1934). The TIF is an enforced contribution – payment is required at the time of issuance of a building permit. W.C.C. § 3.17.060A, Pet. App. F at 54. It is used to pay public expenses, specifically the cost of transportation facilities. W.C.C. § 3.17.090, 3.17.100, Pet. App. F at 62-63.

In *City of Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369, 375 (1974), the Court held that a requirement to pay is a tax so long as it results in any revenue for the government, even if the revenue is insubstantial or if the revenue purpose is only secondary. The TIF does result in revenue for the government, and the revenue purpose is primary. The Washington County Board of Commissioners, which approved the TIF as a pre-requisite to voter approval, found that the TIF was "an appropriate and necessary exercise of the taxing power of the Board of County Commissioners." Ordinance 379 § 2B, App. at 2.

There is another reason to consider the TIF a tax. Washington County is a jurisdiction with specific rules as to how taxes are to be adopted. Those rules differ from the rules for adopting fees or imposing special assessments. In Washington County, taxes approved by the County Board

---

is a change to a more intensive use), whereas a scheme based on numbers of employees would result in a constant intrusion of the government to determine whether the numbers of employees had increased.

of Commissioners must also be approved by the voters of the County. Washington County, Or., Charter Section 20(a). The TIF was adopted by the Board of Commissioners and approved by the voters as a tax. *See* Pet. App. D at 40. If a special procedure is required for adoption of a tax and that procedure is followed, what results is a tax.

B. The TIF is a Tax under State Law.[5]

Under Oregon law, the goal in interpreting a statute or ordinance is to determine the intent of the adopting body, relying solely on the text and context of the ordinance if the intent can be determined from the text and context. *Portland General Electric v. Bureau of Labor and Indus.*, 317 Or. 606, 610-11 (1993). The intent of the Board of Commissioners and the voters is clear from the text of the TIF ordinance. A stated purpose of the TIF is that "[t]his tax shall provide funds." W.C.C. § 3.17.020B, Pet. App. F at 47. The ordinance requires annual review "to determine whether additional tax revenues should be generated." W.C.C. § 3.17.140, Pet. App. F at 67. The Board and voters clearly intended the TIF to be a tax. Under Oregon law, that makes it a tax.

The Court of Appeals' decision is not to the contrary. The Court of Appeals did not hold that the TIF was not a tax. It held that it had a "hybrid quality" incorporating

---

[5] The County and the City do not accept that state law affects the determination whether the TIF is a tax for purposes of a claim that the TIF is a taking under the United States Constitution. Whether the TIF is a tax for purposes of the Takings Clause is determined by federal precedent, but this section is included to address arguments by petitioner that state law determines whether the TIF is a tax.

aspects of a tax and aspects of a special assessment and avoided the question whether it was a tax. Under Oregon law, if a requirement to pay does not fully comply with the requirements for an assessment for local improvements, it is a tax. *See e.g.*, OR. CONST. Art. XI, Section 11b(2)(b) and (d).[6] The TIF is a tax under Oregon law because it does not fully comply with the requirements of a special assessment.

The Circuit Court held that the TIF is a tax. Pet. App. D at 40. The Court of Appeals in classifying the TIF was primarily concerned with whether the systems development charge statutes applied and paid far less attention to whether the TIF was a tax. The Court of Appeals concluded that the TIF is subject to the SDC statutes but did not decide whether the TIF is a tax. However, under the Court of Appeals' previous decision in *Oregon State Homebuilders v. City of Tigard*, 43 Or. App. 791, 798, 604 P.2d 886 (1979), a local government may properly treat an SDC as a tax. Here, the City and County treat the TIF as a tax, so it is properly considered a tax under state law as the Circuit Court correctly held.

C. The TIF Was Not Imposed as a Condition of Approval.

Dolan involved conditions of approval in a land use decision. Here, petitioner received a land use approval for

---

[6] The TIF is not subject to Article XI, Section 11b of the Oregon Constitution because, although it is a tax, it is not imposed on property.

the expansion of the building,[7] and the approval did not contain a condition requiring payment of the TIF. The requirement to pay the TIF at the time of building permit issuance is found in the Washington County Code. W.C.C. § 3.17.060A, Pet. App. F at 54. This is not a case of an exaction imposed as a condition of approval, it is a case involving a tax that is payable at the time of building permit issuance.

D. The Tax Issue Would Prevent the Court from Reaching the Issue that Petitioner Seeks to Have Heard.

The TIF is a tax and as such is not a taking. A *Dolan* analysis is triggered only if a court first finds that the challenged action would constitute a taking outside the context of a land use approval. *Dolan v. City of Tigard*, 512 U.S. at 385. Before the Court could ever reach the issue that petitioner seeks to have it address, it would have to decide the issue whether the TIF is a tax. Because the TIF is a tax, that issue would be determinative and the issue that the petitioners seek to have considered could not be addressed.

III. The Cases Do Not Present a Significant Conflict.

With one exception, the lower courts addressing the kind of charge imposed in *Rogers* have developed a common

[7] An expansion that resulted in the addition of more than 30,000 square feet of building space and approximately 100 additional parking spaces.

approach to constitutional analysis. Where a local government monetary charge is based upon a pre-established legislative framework, imposed on a broad class of property owners, and subject to minimal discretion in imposition or calculation, *Dolan* does not apply. Only where one of the above factors is not present may heightened scrutiny apply. Stated another way, the lower courts are in general agreement that *Dolan* should be applied to a monetary exaction only where the charge has been imposed pursuant to a discretionary, individual adjudication. It is important to note that most of the cases are state court decisions, often including various unique state case law and statutory issues.

The leading cases are *Ehrlich* and *San Remo*, due to their detailed analysis of the issues. Other impact fee decisions support the same analytical approach. *Home Builders Association of Central Arizona v. City of Scottsdale*, 187 Ariz. 479, 930 P.2d 993 (water development fee not subject to *Dolan* because no individual adjudication; *Ehrlich* cited with approval), *cert. denied,* 521 U.S. 1120 (1997); *Krupp v. Breckenridge Sanitation District*, 19 P.3d 687 (Colo. 2002) (generally applied sewer fee not subject to *Nollan/Dolan* takings analysis); *Waters v. Montgomery County*, 337 Md. 15, 650 A.2d 712 (1994) (*Dolan* inapplicable to "development impact tax"); *Town of Flower Mound v. Stafford Estates Limited Partnership*, 71 S.W.3d 18 (Tex. App. – Fort Worth 2002) (*Dolan* test applies to road improvement condition resulting from an adjudicative decision.).

IV. Cases Cited by Petitioner Can Readily be Distinguished.

As the Oregon Court of Appeals noted in *Rogers*, there are divisions among state courts as to how far to extend *Dolan* beyond its base in real property exactions. 181 Or. App. at 388-389. But there is near consensus among state courts as to proper analysis of non-discretionary, legislatively adopted fee exactions following *Dolan*. Most of the cases cited by Petitioner can readily be distinguished, and do not indicate that there is a conflict among the lower courts that this Court must resolve.

In *Home Builders Association of Dayton v. City of Beavercreek*, 729 N.E. 2d 349 (Ohio 2000), the Ohio Supreme Court announced that it was applying *Dolan* to a transportation impact fee, but did not actually do so. In plaintiff's challenge and the court's ruling applied to the ordinance generally, not to the facts of any particular development. It was therefore not possible to fully apply *Dolan*, which was framed to test an individual exaction. The court found that the "essential nexus" element of *Dolan* was satisfied because the City of Beavercreek fee methodology showed a reasonable relationship between the need for new roadways and the traffic generated by new development. *Homebuilders Association of Dayton*, 729 N.E. 2d at 357. It then incorrectly stated the second prong of *Dolan* to be the relationship between the "fee imposed on a developer and the *benefits accruing to the developer*", *id.* (emphasis added), rather than the impact of the development. *See Dolan*, 512 U.S. at 388. For these reasons, *Homebuilders Association of Dayton* is not an appropriate example of *Dolan*'s application to a development fee exaction.

Petitioner cites *Benchmark Land Co. v. City of Battle Ground*, 14 P.3d 172 (Wash. 2000), *aff'd*, 49 P.3d 8609 (Wash. 2002) as a case applying the *Dolan* tests to a monetary exaction. While the Washington Court of Appeals applied a *Nollan/Dolan* test to a City's requirement to improve an adjoining street, the state's Supreme Court based its holding on the city's failure to meet a state statute in imposing the condition and did not reach the constitutional issue. 49 P.3d at 865. The Oregon Court of Appeals also noted that it was not clear whether or not *Benchmark* involved an adjudicatory action. *Rogers*, 181 Or. App. at 392 n.12.

Trimen Development Co. v. King County, 877 P.2d 187 (Wash. 1994) also is cited by Petitioner as a case in which *Dolan* was applied to a legislatively adopted impact fee. In that case, the Washington Supreme Court upheld a requirement to dedicate park land or pay a fee in lieu of dedication, as a condition of development. Plaintiff in that case challenged the fee under state statutes applicable to development exactions, and the court's holding is based on application of those statutes. 877 P.2d at 194-195. The case was decided less than one month after *Dolan*. The opinion simply cited *Dolan*, apparently implying that compliance with the state statute at issue was similar to finding rough proportionality between a required dedication and impact of a development. *Id.* at 194. The court in *Trimen* undertook no analysis of the Takings Clause as applied to fees in its opinion.

In *Manocherian v. Lenox Hill Hospital*, 643 N.E.2d 479 (N.Y. 1994), the local government had required a property owner to provide a leasehold interest in real property to another private entity. Therefore it is of limited value as to the question of impact fees charged for

public facilities. *Northern Illinois Homebuilders Ass'n v. County of Du Page*, 649 N.E.2d 384 (Ill. 1995) is also of limited value as constitutional guidance. The Illinois Supreme Court applied a "specific and uniquely attributable" test based on its prior state precedent, acknowledging that it was more strict than *Dolan* would require. 649 N.E.2d at 389.

Most of the variations in the standard of review applied in the cases cited above arise from differences in the nature of the exaction when compared to the kind of charge upheld in *Rogers*. In the other cases, the lower court either did not reach the constitutional issue, or applied a standard unique to the law of its state.

V. The Issue Whether State Courts Are in Conflict Is Less Important When the Decision Is Not by the Highest Court in the State.

The decision below was by the Oregon Court of Appeals, the first level appeal court in Oregon. The Oregon Supreme Court denied review and refused to hear the case.

Supreme Court Rule 10(b) provides that a reason to grant a petition for certiorari is that a state court of last resort has decided a federal question in a way that conflicts with a decision of another state court of last resort or of a United States court of appeals. Supreme Court Rule 10(c) provides that a reason to grant a petition for certiorari is that any court has decided an important federal question in a way that conflicts with relevant decisions of this Court.

While the list of considerations in Rule 10 is not exclusive, the list does demonstrate that decisions by state courts that are not the court of last resort in the state are less important in considering whether there are conflicts between courts.

There are good reasons for this position. First, a state intermediate appellate decision is less likely to be considered outside its jurisdiction. Second, the intermediate appellate position can later be overturned by the state court of last resort.

Rule 10(c) does not apply. That rule provides a reason for review only if the state court decision conflicts with a relevant decision of the Supreme Court. The decision in this case, like the decisions in other impact fee and development charge cases in which the Court has denied review,[8] does not conflict with *Dolan*, because *Dolan* applied only to exactions of real property as a condition of development approval, *City of Monterey v. Del Monte Dunes of Monterey, Ltd.*, 526 U.S. 687, 702-03 (1999), and does not extend to legislatively adopted development charges, whether imposed as taxes or otherwise.

---

[8] Those cases include *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872, 875-76 (9th Cir. 1991), *cert. denied*, 504 U.S. 931 (1992); *Home Builders Association of Central Arizona v. City of Scottsdale*, 187 Ariz. 479, 930 P.2d 993, *cert. denied*, 521 U.S. 1120 (1997).

VI. This Case Has Little Value as Precedent. The TIF Differs from Other Development Charges Because It Was Adopted as Tax by a Vote of the People.

The TIF was adopted as a tax, following all the formalities applicable to the adoption of a tax, including an ordinance by the County Board of Commissioners and approval by the voters. Few, if any, other development charges have been adopted as a tax. A decision in this case would have little value as precedent because it would apply only to those cases involving a tax imposed at the time of development. It would have no value as precedent in a case involving a development charge that has not been adopted as a tax and would provide no precedent for *ad hoc* requirements to pay.

CONCLUSION

The petition for writ of certiorari should be denied for the reasons stated above.

Respectfully submitted,

DAN R. OLSEN *
LORETTA S. SKURDAHL
WASHINGTON COUNTY COUNSEL
155 N. First Avenue
Suite 340
Hillsboro, Oregon 97124
(503) 846-8747
Attorneys for Washington County

TIMOTHY V. RAMIS
GARY FIRESTONE
RAMIS, CREW, CORRIGAN & BACHRACH, LLP
1727 NW Hoyt Street
Portland, Oregon 97209
(503) 222-4402
Attorneys for City of Tigard

* *Counsel of Record*

APPENDIX

"A" Engrossed

IN THE BOARD OF COUNTY COMMISSIONERS

FOR WASHINGTON COUNTY, OREGON

Ordinance No. 379 (An Ordinance Adopting a Countywide Traffic Impact Tax on New Development, Providing Certain Exceptions and Credits, Establishing Administrative Procedures, Repealing the Existing TIF and Referring This Ordinance To the Voters.

(Filed Aug. 10, 1990)

SECTION 1.

The Board of County Commissioners of Washington County, Oregon, ordains:

A. The Traffic Impact Fee ordinance first adopted in 1986, as subsequently amended, has been an efficient, effective and equitable program to address a portion of the extra-capacity road needs generated by new development.

B. Extending the tax countywide will promote cooperation between the applicable jurisdictions, enhance economic development, encourage uniform application of laws relating to new development, provide additional revenues to meet a portion of extra-capacity needs and, in general, represents a wholistic approach to the issue of accommodating development while preserving the health and welfare of the citizens of Washington County.

C. Certain changes to the prior TIF program are necessary for proper countywide application and to

respond to the needs and concerns of the cities within Washington County. The Board recognizes that it is necessary to negotiate intergovernmental agreements with cities to address administrative issues important to implementation of this Ordinance.

SECTION 2.

A. The Board adopts the report entitled "Countywide Traffic Impact Fee Needs Policies" in support of this Ordinance and notes that the tax imposed by this ordinance does not meet all of the identified needs for extra-capacity improvements but must be viewed as one component of a multi-faceted program.

B. The Board has heard testimony from staff, interested jurisdictions, groups and individuals, has been fully apprised of the issues and finds that this is an appropriate and necessary exercise of the taxing power of the Board of County Commissioners.

SECTION 3.

A. Exhibit "A" attached and by this reference hereby is adopted as the traffic impact fee ordinance imposing a countywide tax as provided for therein.

B. Pursuant to Charter Section 10(a), this ordinance shall be referred to the voters at the special election set for September 18, 1990 and, if approved, pursuant to Charter Section 50(c) shall take effect 30 days from such approval.

C. The Office of County Counsel is authorized to [certify] *codify* this ordinance, and is hereby authorized to

make any technical changes, not affecting the substance of this ordinance, as necessary to accomplish such codification.

D. A determination by a court of competent jurisdiction that any section, clause, phrase, or word of this Ordinance, or its application, is invalid or unenforceable for any reason shall not affect the validity of the remainder of the Ordinance or its application and all portions not so stricken shall continue in full force and effect.

SECTION 4.

A. Upon the effective date of this Ordinance, Washington County Code Chapter 3.17, originally adopted as Ordinance Nos. 310, 319 and 328, is repealed except for the limited applicability provided in Exhibit "A" for previous developments or developments in process.

B. All TIF funds received pursuant to said repealed ordinances may be expended as provided therein. Adoption of this ordinance shall in no way impact the validity of credits, offsets, public improvement contracts, appropriations, budgets or other such actions taken or decisions made in accordance with the former TIF ordinance.

ENACTED this 14th day of August, 1990, being the 4th reading and 2nd public hearing before the Board of County Commissioners of Washington County, Oregon.

BOARD OF COUNTY COMMISSIONERS FOR WASHINGTON COUNTY, OREGON

APPROVED

/s/ Roy R. Rogers
Chairman
/s/ Pam Rychart
Recording Secretary

	READING	PUBLIC HEARING
FIRST	July 24, 1990	August 7, 1990
SECOND	July 30, 1990	August 14, 1990
THIRD	August 7, 1990	
FOURTH	August 14, 1990	
FIFTH	_____	

VOTE: Aye Meek, Larrance, Rogers
Nay None
Absent Hays, Killpack
Abstain None

Recording Secretary: /s/ Pam Rychart Date: 8/14/90

APPENDIX A

LAND USE CATEGORY/DESCRIPTION	BASIS FOR TRIP DETERMINATION	WEEKDAY AVERAGE TRIP RATE	WEEKEND AVERAGE TRIP RATE
Residential			
210 – Single-Family Detached Housing	Number of Units	10.0	
220 – Apartment	" " "	6.10	
221 – Low-Rise Apartment	" " "	6.60	
222 – High-Rise Apartment	" " "	4.20	
230 – Residential Condominium	" " "	5.85	
231 – Low-Rise Condominium	Not Available	*	
232 – High-Rise Condominium	Number of Units	4.18	
240 – Mobile Home	" " "	4.81	
250 – Retirement Community	" " "	3.30	
260 – Recreational Home	" " "	3.16	
270 – Planned Unit Development (Residential)	" " "	7.44	
Institutional			
010 – Watersports	Ship Berths	100.00[3]	*
020 – Airport	Not Available	*	*
021 – Commercial Airport	Avg. Flights/Day	11.83	*
022 – General Aviation Airport	" " "	3.06	*
030 – Truck Terminals	T.G.S.F.	9.86	
040 – Railroad Terminal	Not Available	*	*
410 – Park	Parking Spaces	7.58	11.82
411 – City Park	Acres	3.66	33.58
412 – County Park	Acres	2.11	2.26
413 – State Park	Acres	1.05	1.78
420 – Marina	Boat Berths	3.00	5.55
430 – Golf Course	Parking Spaces	6.62	5.95
440 – Theater	Not Available	*	*
441 – Live Theater	" "	*	*
442 – Music Theater	" "	*	*
443 – Movie Theater (sit down)	Parking Spaces	6.19[1]	7.18[1]
444 – Drive-In Theater	Not Available	*	*
450 – Stadium	Parking Spaces	0.55	*
451 – Baseball/Football	Not Available	*	*
452 – Horse Race	Parking Spaces	1.08	*
453 – Auto Race	Not Available	*	*
454 – Dog Race	" "	*	*
460 – Camp	" "	*	*
491 – Tennis Courts	T.G.S.F.	32.93	23.80
492 – Racquet Clubs	"	15.94	23.85
501 – Military Base	Number of Employees	1.78	*
510 – Preschool	Not Available	*	*
520 – Elementary School	Number of Students	1.03	*
530 – High School	" " "	1.39	*
540 – Junior/Community College	" " "	1.55	*
550 – University	Number of Students	2.41	*
560 – Church	T.G.S.F.	7.70	18.18

LAND USE CATEGORY/DESCRIPTION	BASIS FOR TRIP DETERMINATION	WEEKDAY AVERAGE TRIP RATE	WEEKEND AVERAGE TRIP RATE
565 – Day Care Center	"	67.00	6.15
570 – Court	Not Available	*	*
571 – Prison[4]	" "	*	*
580 – Museum/Gallery	" "	*	*
590 – Library	T.G.S.F.	45.50	25.39
610 – Hospital	T.G.S.F.	16.69	11.29
620 – Nursing Home	Number of Beds	2.60	2.26
Business and Commercial			
310 – Hotel	Number of Rooms	8.70	
320 – Motel	" " "	10.19	
330 – Resort Hotel	" " "	18.40	
810 – Retail-General Merchandise	Not Available	*	
811 – Specialty Store	" "	*	
812 – Building Materials/Lumber	T.G.S.F.	30.56	
813 – Lumber	Not Available	*	
814 – Specialty Retail Center	T.G.L.S.F.	40.68	
815 – Discount Stores	"	70.16	
816 – Hardware/Paint Store	T.G.S.F.	53.21	
817 – Nursery	"	36.17	
820 – Shopping Center under 50,000 Gr.Sq.Ft.	T.G.L.S.F.	94.71	
821 – Shopping Center 50,000 – 99,999 Gr.Sq.Ft.	T.G.L.S.F.	84.51[2]	
822 – Shopping Center 100,000 – 199,999 Gr.Sq.Ft.	"	66.62[2]	
823 – Shopping Center 200,000 – 299,999 Gr.Sq.Ft.	"	53.62[2]	
824 – Shopping Center 300,000 – 399,999 Gr.Sq.Ft.	"	45.66[2]	
825 – Shopping Center 400,000 – 499,999 Gr.Sq.Ft.	"	41.41[2]	
826 – Shopping Center 500,000 – 999,999 Gr.Sq.Ft.	"	36.63[2]	
827 – Shopping Center 1,000,000 – 1,200,000 Gr.Sq.Ft.	"	32.82[2]	
828 – Shopping Center Over 1,200,000 Gr.Sq.Ft.	"	32.38[2]	
831 – Quality Restaurant	T.G.S.F.	95.62[2]	
832 – High-Turnover, Sit-Down Restaurant	"	100.00[3]	
833 – Drive-In Restaurant	"	100.00[3]	
834 – Drinking Place	Not Available	*	
841 – New Car Sale	T.G.S.F.	47.52	
842 – Used Car Sale	Not Available	*	
843 – Auto Parts Sale	Not Available	*	
844 – Service Station	No. of Pumps	100.00[3]	
845 – Tire, Battery and Accessory	Not Available	*	

LAND USE CATEGORY/DESCRIPTION	BASIS FOR TRIP DETERMINATION	WEEKDAY AVERAGE TRIP RATE	WEEKEND AVERAGE TRIP RATE
846 – Car Wash	Not Available	*	
847 – Auto Repair	Not Available	*	
848 – Highway Oasis (including truck fuel, minimal trucker and mechanical services)	" "	*	
849 – Truck Stop (including food, auto and truck mechanical services, trucker supplies and trucker overnight sleeping accommodations)	Not Available	*	
850 – Supermarket	T.G.S.F.	100.00[3]	
851 – Convenience Market	" "	100.00[3]	
870 – Apparel	" "	3.33	
890 – Furniture Store	" "	4.35	
895 – Video Arcade	" "	9.60	
911 – Bank (walk-in)	" "	100.00[3]	
912 – Drive-In Bank	" "	100.00[3]	
913 – Savings and Loan (walk-in)	" "	61.00	
914 – Drive-In Savings and Loan	" "	100.00[3]	
Office			
630 – Clinic	T.G.S.F.	23.79	
711 – General Office, Under 100,000 Gross Square Feet (G.S.F.)	*	16.31	
712 – General Office, 100,000 – 199,000 G.S.F.	*	12.40	
713 – General Office, 200,000 G.S.F. and Over	*	11.54	
720 – Medical Office Building	*	34.17	
730 – Government Office Building	T.G.S.F.	68.93	
731 – State Motor Vehicles Department	*	16.60	
732 – U.S. Post Office	" "	86.78	
740 – Civic Center	" "	25.00	
750 – Office Park	USE General Office		
760 – Research Center	T.G.S.F.	6.09	
770 – Business Park	*	12.42	
910 – Financial	Not Available	*	
915 – Stockbroker	" "	*	
916 – Lending Agency	" "	*	
920 – Real Estate	" "	*	
930 – Insurance	T.G.S.F.	11.45	
Industrial			
110 – General Light Industrial	T.G.S.F.	6.97	
120 – General Heavy Industrial	"	1.50	
130 – Industrial Park	"	6.97	
140 – Manufacturing	"	3.85	
150 – Warehouse	"	4.88	
151 – Mini-Warehouse	"	2.61	
170 – Utilities	Employees	1.07	

LAND USE CATEGORY/DESCRIPTION	BASIS FOR TRIP DETERMINATION	WEEKDAY AVERAGE TRIP RATE	WEEKEND AVERAGE TRIP RATE
180 · · Agricultural	Not Available	*	
860 – Wholesale	T.G.S.F.	6.73	

NOTES

* Not Available – Indicates that the ITE manual does not contain information for this use. Therefore, the basis for trip determination shall be as set forth in Section 3.17.040(D).

[1] Without Matinees

[2] Note: Rate obtained by taking average of maximum and minimum rates of range

[3] Note: Rate capped at 100.00

[4] Note: Category may be used for permits submitted after January 15, 1996

TGSF – Thousand Gross Square Feet

TGLSF – Thousand Gross Leasable Square Feet